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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1049

DWIGHT D. KINNE and CHARLES H. KINNE, and LELIA M. KINNE,
Petitioners,

vs.

STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

W. N. MULLEN,
315 Montgomery Street, San Francisco 4, California,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Bank of America Building, Willows, California,
Of Counsel.

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(Petition)

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to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit

Court of Appeals for the Ninth Circuit, entered in the above case December 11, 1944, reversing a judgment of the United States District Court for the Northern District of California in an agricultural composition and extension proceeding under the National Bankruptcy Act.

OPINION BELOW.

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 51) is reported in 146 F. (2d) 8.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 11, 1944. (R. 55.) Petition for rehearing was duly filed January 10, 1945, and was denied by the Circuit Court of Appeals January 17, 1945, without comment. (R. 56.) The jurisdiction of this Court is invoked under Sections 24 and 25 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938 (USCA Title 11, Sec. 47(c)), and Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (USCA Title 28, Sec. 347).

QUESTIONS PRESENTED.

1. Where a conditional sales contract for the sale of farm land in California calls for installment pay-

ments, and makes time of the essence, and where the purchaser has been in default for a period of years but negotiations for compromise and adjustment (aided by the Farm Security Administration) continue while the purchaser remains in possession, and then a notice of default purporting to "hereby terminate" the rights of the buyer is given, without affording the buyer an opportunity to pay the full amount due and receive a deed, did not the Circuit Court of Appeals err in reversing the order of the Conciliation Commissioner which had been confirmed by the District Court, such reversal in effect being contrary to established California law on the subject of forfeiture under conditional sales contracts for the sale of land?

2. Where an appeal is taken to the Circuit Court of Appeals from a decision of the District Court affirming an order of the Conciliation Commissioner in an agricultural composition and extension proceeding, where said order of the Commisioner had been made upon findings of fact after full hearing of many witnesses, and where no serious, or any, error has been pointed out by appellant, did not the Circuit Court err in deviating substantially from the established law announced by the decisions of this Court, the decisions of many Circuit Courts, and Rule 52a of the FRCP that such findings and decision of the District Court shall not be set aside unless there be a plain and clear showing of error?

3. Where an appeal is taken to the Circuit Court of Appeals from a decision of the District Court

affirming an order of a Conciliation Commissioner made pursuant to full hearing of oral and documentary evidence comprising 179 pages of transcript, and the appellant fails to include such transcript of testimony in the record on appeal, and such record is not available to the Circuit Court on the appeal, did not the Circuit Court depart from the accepted and usual course of judicial proceedings in a material and prejudicial manner by disregarding the facts found below and by drawing its own inferences from facts merely assumed by it and by reversing the District Court?

STATEMENT.

Petitioners are farmers who sought relief under the agricultural composition and extension provisions of the Bankruptcy Act by filing their petition February 26th, 1943, which was referred to the Conciliation Commissioner March 1st, 1943. (R. 2-5.) The instant proceeding arose by the filing by respondent School of a petition to strike from the debtors' schedule all of the farm land claimed by the farmer-debtor. (R. 17; 51.) The motion to strike was heard by the Conciliation Commissioner, an attorney at law of long experience; evidence, both oral and documentary was considered. The transcript of testimony and evidence before the Commissioner comprises 179 pages, but this was not included by appellants in the record on appeal to the Circuit Court of Appeals, and that Court did not have such evidence before it. (R. 12.) The petition to strike was denied by the Commissioner

(R. 17), whereupon respondent sought review by the District Court (R. 31), and thereafter, on February 21st, 1944, the District Court approved the action of the Conciliation Commissioner. Appeal to the Circuit Court of Appeals for the Ninth Circuit followed, the Circuit Court reversing the decision. (Opinion of Circuit Court, R. 51.) Petition for rehearing was duly filed, and denied. (R. 56.)

The sole issue below was the ownership of the farm land in Tehema County, California, on the date of the filing of the petition for agricultural composition and extension. That issue is to be determined by California state law. The farm land in question was purchased by petitioners Kinne from the predecessor of respondent Starr King School, under a conditional sales contract calling for installment payments and making time of the essence. The precise law involved is the California rule respecting forfeiture under such a contract *where there are equitable considerations of waiver, estoppel, or laches taking the case out of the class of strict forfeitures* illustrated by *Glock v. Howard,* 123 Cal. 1, and putting it within the rule of *Boone v. Templeman,* 158 Cal. 290, which requires, upon the showing of delay in effecting forfeiture, that the creditor, by notice, give the debtor a reasonable time within which to pay the full balance due and receive a deed—Tender of a deed by the seller being essential to effect forfeiture.

The Conciliation Commissioner found the following facts, which are not disputed in any material point (that they are not disputed is apparent by the fact

that respondent (appellant below) did not incorporate the transcript of testimony in the record sent up to the Circuit Court. (R. 12).) The Commissioner concluded that forfeiture of the land under the contract had not taken place, and refused to strike the same from the schedule. The District Court confirmed that order.

FACTS.

(1) *Contract of sale.* March 29, 1937, respondent School sold thirty-eight acres of farm land in Tehama County, California, to petitioners, on a conditional sales contract, wherein time is made of the essence. (R. 37.) Petitioners went into possession, are now on the land, and have been on it continuously with the knowledge of respondent, farming and improving it.

(2) *Default in payments.* It is not denied that petitioners fell in arrears in payments in the early days of the contract, and continued thus to the filing of the petition in bankruptcy.

(3) *Efforts to adjust.* This is one of the most important facts in the case, the issues having been resolved in favor of the petitioners by the trier of facts, but wholly disregarded and nullified by the Circuit Court.

The relationship between seller and buyer was friendly and cooperative until February, 1942. The Conciliation Commissioner found that "for several

months prior to February, 1942, the Farm Security Administration, at Red Bluff, California, acting for and on behalf of the debtors, endeavored to secure a scale down of the balance due under the contract or to otherwise adjust the differences between the School and the Kinnes, even going so far as to contact the Federal Land Bank and secure its advice as to how much it would loan on the property and submit the bank's figures to the School." (R. 26-27.)

(4) *First notice of default,* February 24, 1942.* No solution was found, and on February 24, 1942 respondent served a notice of intention to declare a forfeiture if the entire balance due was not paid by March 29, 1942. (R. 42-43.)

(5) *Continued efforts to adjust.* Petitioners remained on the premises, farming and improving it; they did not pay according to the demand of February 24th; they were not molested in their possession. The Conciliation Commissioner found as a fact that efforts to adjust the differences and effect a compromise or extension continued until January 18, 1943, the representative of the Farm Security Administration being active in that regard. The exact

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*This first notice of default was merely a declaration of an intention to declare a forfeiture at the end of a specified period, and was not a declaration that at the end of the period the purchasers' right would be forfeited. This point was most ably analyzed and discussed by the Conciliation Commissioner in his order denying petition to strike. (See R. 23-26.) It is to be noted that the respondent itself must have considered the first notice ineffectual after the lapse of the year, for it gave the second notice of February 10, 1943. (See infra, point 7 of the statement.

language of the Commissioner is this: "Subsequent to that date (February 24, 1942) and continuing until late in 1942, the Farm Security Administration continued to correspond with the School looking to an adjustment of the contract, but so far as the record shows, received no reply to any of its letters until January 18, 1943, when Mr. Duschak wrote to the Farm Security Administration, advising that since no solution had been found, and the debtors had failed to bring the contract to date, the School had negotiated with another purchaser of the land. This letter of the 18th was apparently the first indication that the debtors or the Farm Security Administration had that the School was no longer interested in working out a new deal with the debtors, but had definitely concluded to cancel the rights under the contract." (R. 27.)

This letter of the 18th of January was, indeed, the first notice to anyone that the School was not interested in further negotiation. The Commissioner, however, did not note in his opinion a very striking portion of the testimony, that of a letter from respondent's agent, Mr. Duschak, to Dave Jones of the Farm Security Administration, dated December 31, 1942, in which it was stated in part:

> "Apology is due you for my failure to reply to your letter of October 15th, 1942, and I now have your letter of December 15th. The reply was delayed *in the hope I might come to Capay Rancho personally and look into the situation* with Mr. Kinne, but circumstances have prevented it * * *"

The foregoing is found in the Rep. Tr., page 87. It was called to the attention of the Circuit Court on petition for rehearing, but that Court persisted in its own interpretation of the few facts presented to it and which it assumed, and swept away all of petitioners' property rights in direct and flagrant disregard of the overwhelming evidence that petitioners had been lulled into a sense of security by the protracted compromise negotiations extending over a period of many years.

It must be noted particularly in this regard that the foregoing finding of fact was made after the hearing of the testimony of the interested parties, and of the representative of the Farm Security Administration. *This testimony was not before the Circuit Court, yet that Court has wholly and completely reversed the judgment below by drawing its own inferences from facts not before it.* (R. 54.)

(6) *Improvements and increased value.* The petitioners, between the notice of default of February, 1942, and February, 1943, made substantial improvements, repairs, and did maintenance work. The value of the premises was increased by the efforts of the petitioners to $8,000.00 or nearly three times the amount against it. (R. 29-30.)

(7) *Second notice of default,* February 10, 1943.* In spite of the failure of respondent to take any

*See discussion in brief annexed hereto on subject of California Law on requirements of notice to effect forfeiture after lapse of time while buyer in default.

action following the first notice a year earlier; in spite of continued negotiations for composition; in spite of continued peaceable possession by petitioners, who continued farming the land and improving it, suddenly came the notice of February 10, 1943, "reciting that since the debtors had failed to pay the delinquency on or before March 29, 1942, as demanded in the notice of February 24, 1942, the School '*hereby* terminates all your rights in and to the said real property and premises hereinafter described and demands that you surrender possession'." (R. 19.)

(8) Petitioners have been in possession continuously since the purchase in 1937, have farmed the property well, have increased its value, and seek only the application of the salutary provisions of the agricultural composition and extension provisions of the bankruptcy law.

REASONS FOR GRANTING THE WRIT.

1. DECISION OF THE CIRCUIT COURT OF APPEALS IS A DECISION OF AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The California law is quite certain that where there are equitable circumstances, such as estoppel, waiver, or laches, the strict forfeiture provisions of a conditional sales contract on land are to be relaxed to the extent that before a forfeiture can be effected, the seller must give the buyer an opportunity to pay up in

full, and must tender a deed to be delivered upon such payment. *Boone v. Templeman,* 158 Cal. 290.

The question is important because it strikes at the very core of our economic stability. The very statute under which this whole proceeding arose, (Agricultural extension and composition provisions of the Bankruptcy Act) is designed to give every farmer an opportunity to work out a fair and economic adjustment of his financial problems. The whole salutary endeavor of that legislation is frustrated by the decision of the Circuit Court herein running contrary to California law. The evidence contained in the record before the Circuit Court (the complete reports of the Conciliation Commissioner, R. 6-10; 17-30), is overwhelmingly in substantiation of the existence of facts bringing the case within *Boone v. Templeman.*

The Circuit Court relied heavily upon the case of *Federal Farm Mortgage Co. v. Davis,* 132 F. (2d) 663. That case correctly states the law in situations not involving equitable considerations, but it does not touch upon the situation established by the evidence in the case at bar, to wit, a case where a *course of dealing over a long period of time* has given the buyer to understand that his prior and continuing default will not be seized upon as a means of forfeiture.

2. IMPORTANT QUESTION OF FEDERAL LAW DECIDED IN WAY WHICH PROBABLY CONFLICTS WITH DECISIONS OF THIS COURT.

The basis of the decision of the Circuit Court of Appeals is that even though the evidence is not before it in the record (R. 46), and no error whatever is pointed out by appellant other than appellant's dissatisfaction with the inferences and conclusions drawn by the trier of facts, the Circuit Court may yet disregard the facts found by the Conciliation Commissioner, and the inferences and conclusions therefrom, which were affirmed by the District Court, and reverse the District Court. It is petitioner's position that in making this decision the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court in *Warren v. Keep* (1894), 155 U. S. 265, and *Furber v. Ferris* (1892), 145 U. S. 132, and Rule 52a, FRCP.

In *Warren v. Keep* the action was based on alleged infringement of patents. The matter was referred to a Master, and decision entered in conformity therewith. At page 267 the Court's opinion states: "There was a considerable amount of this evidence, and it was, to some extent, conflicting. The Master acted in view of this evidence, and the Court below concurred in his finding, except in some unimportant particulars. As no obvious error or mistake has been pointed out to us, their conclusions must be permitted to stand." (Citations.)

In *Furber v. Ferris,* supra, this Court, speaking through Mr. Justice Brewer, said:

"The gist of this controversy was the alleged negligence of the receiver in failing to maintain a reasonably safe crossing. This presented mainly a question of fact. Upon the testimony, both the master and the Circuit Court found that there was no negligence, and, while such determination is not conclusive, it is very persuasive in this court. In *Crawford v. Neal,* 144 U. S. 585, 596, it was said:

'The cause was referred to a master to take testimony therein, "and to report to this Court his findings of fact and his conclusions of law thereon." This he did, and the Court, after a review of the evidence, concurred in his finding and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.' (Citations omitted.)

That rule compels an affirmance of the decree in this case."

Rule 52a, FRCP, states a rule in substantial conformity with the decisions of this Court, and the almost uniform holdings of the Circuit Courts.

Importance of question. The importance of the adherence by the Circuit Courts to such a long-established and well-settled mode of procedure on appeal is particularly important in cases such as the one at bar, involving as it does a litigant who is admittedly and obviously in strained financial circumstances. That

such cases are numerous, cannot be denied. That our law should afford equal justice to a poor litigant is also a proposition that cannot be denied. The harmful effect of the Circuit Court's departure in this case is apparent. The preparation of a record on appeal is a matter of considerable expense; the attendance of counsel at oral argument when the Court is held over 200 miles from the residence of the litigant is also of considerable expense. Is it not the normal, and proper procedure for a litigant successful before the Conciliation Commissioner, and successful before the District Court, on substantial evidence, to consider carefully the necessity for augmenting the record prepared by the appellant, and the need of appearing for oral argument on the facts of the case? And where appellant does not choose to send up the record of testimony, and does not choose to point out any serious error to the Circuit Court in its brief or otherwise, is not a litigant in the federal courts entitled to rely upon the above-stated principles of appellate proceduce? An analysis of the case at bar reveals no ground or basis whatever for reversal; the opinion of the Circuit Court obviously bases reversal on its *own interpretation of facts* differing from the interpretation put on those facts, (mainly matters of the conduct of, and negotiation between, the parties) (R. 54.) Had petitioner here the slightest indication of such flagrant departure from established principles, he could have, and undoubtedly would have, insisted upon the full transcript going up to the Circuit Court, and would have appeared before that Court and

argued the *facts* and inferences, if they were to be the turning point of the case. The decision of this Court means that no litigant is safe in relying on the record in the courts below; all litigants in all cases must expend considerable sums of money to defend against the possibility that some appellate Court is going to take unto itself the function of a trial Court, and in effect grant a trial *de novo,* but without the evidence, and without the litigant's having an opportunity to clarify errors as to facts assumed by the Appellate Court.

The matter is of importance to all litigants in the federal courts. It is of paramount importance to parties in bankruptcy litigation; it is of tremendous importance to a farmer-debtor in a farm compromise and extension proceeding.

Finally, the question is of utmost importance in the fair and equitable administration of the salutary provisions of the farm compromise and extension provisions of the Bankruptcy Law.

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3. **IN MAKING THE DECISION IN THIS CASE THE CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO CALL FOR AN EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.**

No transcript of testimony was sent up to the Circuit Court. So far as evidence is concerned, the Circuit Court had before it only the findings and con-

clusions of the Conciliation Commissioner, affirmed by the District Court (R 6-10; 17-30.) These were presumptively correct, and in the absence of a clear showing of error were to be sustained, even where the record is before the Circuit Court; *a fortiori* where the evidence the basis of the decision below is not before the Appellate Court.

In *Bernards v. Johnson,* 103 F. (2d) (9th Cir.), a case involving the effect of foreclosure and title to property, the Court, speaking through Justice Mathews, said:

> "The orders appealed from are based on findings. The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct."

And again, in *Irving Trust Co. v. Nelson,* 59 F. (2d) 553, 559, it is said:

> "Where the facts upon which an order is based are in dispute, this court *must assume, in the absence of a record containing all the evidence,* that the findings upon which the order is based are justified."

Importance of question. A litigant should be entitled to rely upon the clear enunciation of the law, on matters of appellate practice and the scope of review as well as on other matters. The case at bar illustrates the vital importance of such a question, and the gross miscarriage of justice where there is a deviation from established policy. It is obvious from the rec-

ord that petitioners are in strained financial circumstances. Many litigants in the federal courts are in the same condition. We announce to the world equality and equal justice for all, rich or poor. When a litigant has expended all that he can scrape together to defend himself in the lower federal courts, and has been successful before the Conciliation Commissioner, and before the District Court, is he not entitled to rely upon the record in his case on appeal *in conformity with established law?* A full review of the record in the case at bar, including briefs on appeal and petition for rehearing, establishes the soundness of petitioners' position, and fully justified their determination to permit the matter to go to the Circuit Court without going to additional expense to have the transcript prepared, and the heavy expense of sending counsel over 200 miles to argue the case orally. No practitioner of experience would have felt justified in asking his client to advance substantial sums of money for these purposes in the light of the record herein and under the law as stated.

But the Circuit Court of Appeals for the Ninth Circuit has taken upon itself the function of a trial Court; has in effect tried this case *de novo,* has ignored the principles of appellate practice and scope of review, and has reversed the District Court without any showing whatever of error having been made.

The continuance of such procedure by the Appellate Courts will undermine the administration of justice, and will give a great advantage to the wealthy

litigant, and sorely prejudice the litigant of moderate means.

This is a case for the exercise by this Court of its supervisory powers.

CONCLUSION.

It is respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
March 12, 1945.

W. N. MULLEN,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Of Counsel.

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